No. 2790.

United States Circuit Court of Appeals

Ninth Circuit.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.
THE SOUTHERN PACIFIC COMPANY,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

REPLY BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

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For Defendants in Error.

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In this cause there are in our judgment but two questions to be considered, and those are, first, whether or not the release at Colton constituted a recognizable break in service, and, second, whether or not the jury were justified in finding that the run covered by Counts 13 to 18 inclusive of plaintiff's complaint, would be relieved by virtue of a condition for which the defendant company could

not be held responsible, by reason of the fact that the condition as it existed was the result of an unprecedented rainfall, the extent and character of which could not be accurately ascertained insofar as it might affect the time to be used in making the run by the defendant company at the time the crew started. All of the facts except as to the unprecedented character of this flood were covered by a stipulation, and this stipulation is set out in full on pages 3 to 7 inclusive of the opening brief and argument of plaintiff in error. Much of the testimony is quoted in plaintiff's brief upon this particular phase, from pages 8 to 14 inclusive. However, not all of the testimony of witness L. G. Sloan appears in plaintiff's statement. On page 181 of the Transcript, in answer to a question propounded to Mr. Sloan, he stated:

> "They were released from duty on their arrival until they were called to leave.
> Q. Until they were called?
> A. Yes. 'Released until called' meant that they understood they were off duty. That they were not in any way employed. They are absolutely free. And they would be called when they would be needed, just the same as for their initial trip. The release was for an indefinite period."

It might be well to remember that all of this testimony now being quoted was the testimony of the witness Sloan, while he was on the stand testifying in behalf of the plaintiff. See Transcript, p. 179.

On page 183, this witness, under the direction of the Government, takes up in consecutive order

a great deal of the time covered by the various counts relied upon by the plaintiff, and under the direction of the United States Attorney, directly and positively negatives the idea or theory that the train crew worked in excess of the statutory period.

And on page 185 he testifies that the very object of the lay-over was to furnish the break in the service which would enable the work to be done, and at the same time comply both with the letter and the spirit of the law, and that applies to all of the counts in the complaint except the one of February 27th, which will be discussed at a later point in this brief, in connection with the defense of unprecedented flood.

The question as to whether or not these periods of rest at Colton were indeed periods of rest and recreation, and thus a break in the service, was a question of fact for the jury, which was fully and completely submitted to them under the charge of the Court, as was said by the Court on page 203 of the Transcript:

> "There may be cases where the release from duty of an employee of a railroad company, is so brief, or where the circumstances are such that the Judge may say that the claim that the continuity of the hours of service has been broken, would be a mere sham and a pretense, and the Court would not recognize such a case as being a compliance with the law. On the other hand, there may be cases where the release from the service of the employee, is of such length of time, and is surrounded by such circumstances that the

Court could say that no fair-minded man could dispute the statement that the employee had a fair and reasonable opportunity for rest and recreation, and that the law in such cases had been complied with. Then there may be other cases, where neither of these extremes exist; cases that occupy the middle ground between these extremes; cases where, although there may not be any dispute as to the facts of the case, it is necessary to apply the proven circumstances to the situation in order to determine whether or not the law has been complied with.

I have decided that this case occupies the third situation described. That is to say, it falls within that twilight zone between the two extremes, as above described. I therefore instruct you that you are to apply the probative facts and the proven circumstances in this case, to the situation, and determine whether or not, during the time the employees were released, they had a reasonable and fair opportunity for rest and recreation.

In determining whether or not the men had a reasonable opportunity for rest and recreation during the time that they were released from duty, you shall take into consideration all the facts and circumstances connected with such release; whether it was a release in good faith, and whether or not the men had, during the time they were released, a right to do as they pleased; whether they were masters of their own time, and whether they really had a substantial and opportune period of rest.

> If you find, as aforesaid, that the release from duty at Colton, was a break in the hours of service, within the meaning of the law as I have explained it to you, then you should find for the defendant upon that issue, but if, on the other hand, you should find that the employees were not released in such a manner that they were masters of their own time and did not have a reasonable and fair opportunity for rest and recreation, you should find for the plaintiff upon that issue."

Thus, it will be seen that the Court properly held that this case was within what it saw fit to term the "twilight zone"; that it was a question of fact for the jury to determine whether or not the release at Colton was a release in good faith and so regarded by the Company and its employees, or whether or not it was a subterfuge merely to cover the real design of the parties. Having been fully and fairly submitted to the jury, we believe that we are justified in saying that their finding upon that issue should be considered by this Court, as it was by the trial Court, to be final.

Again, the testimony of Mr. W. H. Whalen, Superintendent of defendant Company, pages 175-6 Transcript, reads:

> "That crew on that day proceeded to Indio and were released at Colton for an hour and thirty minutes. That meant that they were absolutely released from responsibility. I did not hear any of them testify here today that they were released for a definite time. When they are released they can do anything they see fit.

> When released they would probably say, 'You will find me at such and such a place. I will be down at the bunk-house or at the hotel or getting lunch.' At the expiration of one hour and thirty minutes. They are told, 'You are released'. They will say, 'All right, I am going down and get some sleep', or 'All right I am going over to the lunch counter and you will find me there when you want me'. When these men were released they did not know when they would be called again. They might not be called for two hours or they might be called within an hour. The form is 'You are released.' That means that he is released from responsibility until called. * * * When a man is released, when he is notified he is released, he doesn't know anything more than that he is released. * * * When these men were released for an hour and thirty minutes in these particular cases, that meant that they were released, that they were as free men as there is in the world, until the call-boy gets them again."

And this testimony, it will remembered, was testimony offered under the direction of the United States Attorney, on the part of the Government of the United States, and it is in contravention of the testimony offered by him that he contends the jury should have found in his favor.

We now desire to discuss the question of unprecedented flood as applying to those counts submitted to the jury on that issue, with reference to February 27th.

It seems that the theory, so far as the unprecedented flood is concerned, is perhaps best stated in the discussion between Mr. Walter, representing the Government, and the Court as to the admissibility of the testimony. The witness, L. G. Sloan, was asked: (Transcript, page 186.)

> "With reference to February 27th and the days previous to that time, you may tell the jury what the condition of your tracks was, beginning on about the 18th day of February and from then on up until the 27th.
>
> MR. WALTER: "We object to that as immaterial. The statute says that in case of casualty, unavoidable accident or act of God, and where the delay is the result of causes not known to the officers or the crew at the time the crew left the terminal, the statute does not apply. Now, if his testimony is confined to this particular day, and it shows that this heavy rainfall and flood occurred after the crew left the terminal, we have no objection; but we do object to his testifying to the condition of the weather a week before the crew left the terminal. We think under the ruling of the United States Circuit Court of Appeals and other courts this does not apply unless these conditions arise after the crew leaves the terminal.
>
> THE COURT: "The statute is: 'The provisions of this act shall not apply in any case of casualty or unavoidable accident, or the act of God, nor where the delay was the result of a cause not known to the carrier or the officer or agent in charge of such employee at the

time such employee left the terminal, and which could not have been foreseen.'

"Now, of course, if this flood and rain could have been foreseen, and they knew before the train left the terminal that this accident was going to happen, this act would not apply; no doubt about that. It is as plain as A, B, C. But I think that the evidence has got to be taken so that the jury can determine the facts. It is a question for the jury whether that is a fact or not. Now, a rain may have come and it may have poured down like in the days of Noah, but the flood may not have come until after the rain was over, and the tracks may not have been washed out until after the train left the terminal. We cannot tell until the evidence is put in."

MR. WALTER: "Now, I suggest, your Honor, that if a rain has fallen,— I understood him to ask as to the 18th or along about that time —

THE COURT: "Well, you perhaps do not understand this country. The rain may start in on Monday, and it may rain Monday and Tuesday and Wednesday, and then on Thursday there will be a flood that will wash out bridges and tear up roads and do a good deal of damage, and this rain continuing all the time, the ground gradually gets soaked up, and you can't tell where the flood is coming from. These jurors all know about this country, and they will probably take into consideration their own knowledge in regard to those conditions

in this country and these floods, with the proof that may be offered".

And again: (THE COURT) "Now suppose the rain had been falling for three or four days and the track was wet and soft, and the ground was soaked, and these trains leave the depot, and then there comes a cloudburst, or an unprecedented flood in some particular part of the valley, when it is easy to wash out the track or wash out the bridge: Don't you think the jury would have a right to take those things into consideration?

MR. WALTER: "Well, it seems to me, your Honor, if the track is already wet and soaked —

THE COURT: "Is it your idea that they should not send out a train then?"

And again on page 190 (Testimony of L. G. Sloan)

"The morning of the 26th was the first time I got across El Monte bridge. On the 26th and 27th we moved all of this delayed freight. The storms had made the roadbed very soft and we had all kinds of slow orders, safety first being the slogan. * * * We were two nights there trying to get trains for 25 miles along in there. The roadbed on the side was all washed out and we would put ballast and ties and everything along just to get over it, and I see by the train sheet on the 27th that every train coming along there lost — a passenger train would lose as much as one

hour from Colton to Los Angeles on account of track conditions. A freight train would lose — I would say if they got over to Colton from Los Angeles in less than three hours it would be an extra run. You see they have to keep clear of all those passenger trains. Now here is the Golden State Limited on the 27th. He was 50 minutes making the 30 minute run from Colton over towards Ontario on the 27th. That was the day that the other freight train was operated. All trains show a delay of lost time in there. The dispatcher's notes show the time lost on account of soft tracks, slow orders, etc. It was necessary to restrict the speed of all trains to that of safety in that vicinity, and it was many days before we got the track fixed up so that they could make anything like reasonable speed. THERE WAS NO WAY BY WHICH IT COULD BE DEFINITELY DETERMINED BY THE DISPATCHER AS TO WHAT TIME COULD BE MADE ON THIS SOFT TRACK. That was a matter which was necessarily placed largely in the discretion of the crew in actual operation. When the freight train under those conditions left Los Angeles the dispatcher couldn't tell whether he could move to Colton in six hours or nine hours. In the first place the track conditions and the slow trains he had to meet and his delay waiting for them and then other delays waiting for him when he got started over this slow trip. It was awfully slow work and delays trains something terrible. So far as I am concerned, I

know of no way of foreseeing this track difficulty. I couldn't tell how much they were going to lose.

Then again, the testimony of J. B. Lippincott, at page 194, reads:

" * * * I would say that the rainstorm of February, 1914, according to the records of the Weather Bureau here began with great violence on the 18th of February, at Los Angeles, and extended until the 21st of February, both inclusive. The floods that were produced by that storm in the San Gabriel Valley and in that region, according to observations which I personally made, and which were made under my immediate direction, were the greatest flood discharges that I have ever known of in this portion of California or in any other portion of California, when you consider the flood in terms of flood discharge per square mile of rain space, as we had a very, very wet month preceding, with immense floods in January. * * * When a flood falling on the 21st of February, say, as a matter of illustration, at 3 o'clock in the afternoon on the 21st day of February — the actual and direct effect of that flood does not end with the flood itself. It is very different in drainage basins. If you take a drainage basin or catchment basin of a small stream, that is, very short and precipitous, you get a flood very quickly. You would get one from the Rubio Canyon or some of those other canyon or

> drainage basins between Pasadena and Azusa, such a flood, but when you come to San Gabriel River, which is a drainage basin of 220 square miles in area, these floods do not respond as quickly, and they are drawn out longer in duration. If you have a country that is fairly saturated with water by protracted rains, the floods in lesser volumes are pretty well sustained."

This testimony is uncontradicted, and as heretofore stated, a large portion of it proven by witnesses placed on the stand by the plaintiffs themselves.

We think no question can exist but that the defense of an unprecedented flood such as applies to the counts now under discussion, was properly a question for the jury. We contend it was fully and fairly submitted to the jury under the Court's charge, and having found upon that issue with testimony to support the findings, the rule is practically unbroken that the finding of the jury will not be disregarded.

As was said in the case of *United States vs. Lehigh Valley R. Co.*, 219 Fed. 532:

> "Where the casualties or unavoidable accidents relied on by a railroad company to exempt it from liability for violating the federal Hours of Service Law (Act March 4, 1907, c. 2939, 34 Stat. 1415 — Comp. Stat. 1913 — Sec. 8677) were an unusually high wind while a train was going up a grade, a broken tail pin, and a hot box, and there was

testimony as to the nature of the flaw in the tail pin, and also as to what had been done as to packing and inspecting the bearing that heated, the government was entitled to submission of the question whether the delay was due to unavoidable accident, or to causes which might have been avoided by proper foresight and inspection, to the jury."

And again, in the case of *United States vs. Delaware, L. & W. R. Co.*, 218 Fed. 608:

"Where issues were fully reviewed, and the contentions of both parties carefully submitted to the jury by a charge to which no exception was taken by the government, the verdict was conclusive as to the facts on the government's writ of error."

And again on page 610, quoting from the same decision:

"The case at bar was submitted to the jury under a charge which construed the section, stated the issues, reviewed the testimony and the contentions of both sides, and carefully instructed the jury as to what questions they were to decide. The government took no exception to the charge; it submitted a few requests to charge, which were all complied with. Under these circumstances the verdict is conclusive as to the facts in controversy, and no error is pointed out".

In the case of *C. W. Hull Co. vs. Marquette Cement Mfg. Co.*, 208 Fed. 260, it was held:

> "A verdict upon an issue of fact based upon sufficient evidence is conclusive on appeal."

See also the case of *Pennsylvania Casualty Co. vs. Whiteway*, 210 Fed. 782, which holds:

> "A verdict is not reviewable unless there is entire absence of substantial evidence to sustain it."

And again, in the case of *Southwestern Brewery & Ice Co. vs. Schmidt*, 226 U. S. 162, it was said:

> "Whether there was credible evidence to sustain a verdict was for the jury, and not for the appellate court."

And in the case of *American Mfg. Co. vs. Maslanka*, 203 Fed. 465, which held:

> "A verdict based on conflicting evidence will not be set aside on writ of error, as against the weight of evidence on an issue properly submitted to the jury."

Likewise, in the case of *Indian Refining Co. vs. Buhrman*, 220 Fed. 426, where it was held that a verdict rendered on conflicting evidence is conclusive.

It might be noted in this connection, that there can be no question but that if it were a question for the jury to determine, that the issue was fully

and fairly submitted to this jury by the Honorable Judge presiding.

As was held in the case of *United States vs. Atchison, T. & S. F. Ry. Co.*, 212 Fed. 1000:

> "Where a passenger train was delayed after the train crew had left their starting point, by the derailment of a freight train, resulting in the passenger crew being required to remain on duty more than 16 hours, the railroad company was not bound to tie up the train at the first stopping place where its crew could have been replaced, but was entitled, without incurring liability, to operate the train to the end of the passenger crew's run, the word 'Terminal' as used in such section being synonymous with 'the end of the run' of the particular employe involved."

This case discusses the general principles of the Hours of Service Law to a greater extent than any of the cases cited by either of the parties to this action.

We feel that an examination of the record will disclose that all of the issues were fully, completely and properly submitted to the jury, that their verdict is amply supported by the testimony, and for this reason the cause should be affirmed.

Respectfully submitted.

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